

FINANCIAL INSTITUTIONS COMMITTEE
Business Law Section, State Bar of California

Minutes of the Meeting of December 11, 2007

Committee Members Present:

Meg Troughton, Chair
Bruce Belton, Vice Chair
Rosie Oda
David Eckles
Elaine Lindenmayer
Jason Robman
Keith Ungles
Craig Chang
Richard de la Pena
Todd Okun
Shirley Thompson

Advisory Members and Others Present:

John Hancock
Robert Mulford
Joseph Sanchez
Maureen Young
Mike Zandpour
Leland Chan
Mary Price
Neil Rubenstein
Russell Schrader
Morris Hirsch
Michael Occhiolini
Tim LeBas
Ken Davis
Andy Stone
Dave Skidmore
Richard Elbrecht
Marie Hogan
Stephen Lawrence
Bill Webb
Susan Allison
Laura Rogers

Call to Order: Meg Troughton called the meeting to order at 9:30 a.m.

1. Roll Call, Introductions and Administrative Matters: Meg welcomed the Committee Members, Advisory Members and Guests.

2. Approval of the Minutes for November 13, 2007. The minutes for the meeting of November 13, 2007 were approved by the Committee, as presented.

3. Department of Corporations Proposed Residential Mortgage Guidance. Tim LeBas of the California Department of Corporations (DOC) reported on proposed guidance for non-traditional mortgage products, as follows. DOC licenses and regulates mortgage bankers and finance lenders under the California Finance Lender's Law (traditionally consumer and commercial loans). Senate Bill 385 by Senator Machado (copy attached), requires Lenders regulated by DOC and brokers regulated by the DRE to adopt policies and procedures to carry out the guidance and state mandated procedures on sub-prime lending, adopted last November. Some major servicers are trying to be proactive with borrowers before their loan interest rates re-set and are working on a process to determine which borrowers cannot afford their loans. The goal is to modify loans where appropriate to carry out their terms for a "sustainable period of time." The Governor's program is discretionary with non-regulated lenders. Questions were asked about unconstitutional impairment of contracts.

The DOC has been very active in this area, and before 2007 identified a need for this type of guidance for its' licensees. SB 385 now requires all regulated lenders to apply the guidance and develop policies and procedures. Regulations have been adopted for finance lenders and mortgage bankers. Those are now pending review by the Office of Administrative Law. The rules take a very flexible approach in requiring licensees to adopt best practices. The purpose is to achieve three goals: (a) suitability; (b) accountability; and (c) transparency. The concept was to adopt an "investment model" that would typically apply to sales of securities, and apply that to the lending process. The licensees will also have to report annually on implementation of the guidance and maintain books and records for compliance examinations (which take place every two to four years). Loan disclosures are also required by subsection (d) and modeled on the DRE comparison form available on the DRE website. The form is transaction specific and allows for comparison of actual loan offers (real-time disclosures). In addition lenders may develop their own forms, which must focus on the proposed loan amount requested, contain monthly payment scenarios, and provide loan balance scenarios. Prohibitions against certain forms of advertising are contained in subsection (e) and are patterned after the DRE advertising restrictions (primarily focusing on "teaser" rate disclosures and rate differences for loan types). The DFI did not adopt the guidance because the member institutions are already subject to other federal regulatory oversight.

For borrowers with current loan repayment issues, the Commissioner issued 61-FS (copy attached), encouraging lenders and servicers to enter into workout arrangements. 61-FS cites the "Dodd Principles" adopted earlier this year in Congress. Workouts should be commenced before rate resets and the process should be streamlined. DOC conducted a survey to determine how many workouts were negotiated and in process.

All the documents mentioned in this presentation are available on the DOC website at:
<http://www.corp.ca.gov/>

4. Tsunami Disclosure for Student Lending. Laura Rogers of Bank of America reported on developments in student lending as follows. There have been recent investigations by state attorneys general and also recent legislative action in this area. House Bill 4137 requires additional disclosures. It appears that there will be further legislative activity on this Bill in early January. The Private Student Loan Transparency and Improvement Act (copy attached) is eleven pages of a 747 page Bill. Those pages will likely have a phenomenal impact on how student lenders disclose private educational loans. It will amend the Truth in Lending Act and

will apply only to private education loans (those that are issued expressly for post secondary educational expenses to students). The Act does not apply to open end credit or any real estate secured loans (e.g., advances on HELOC account and credit card advances are not covered).

The Federal Reserve Board must issue interpreting regulations within 180 days after passage, and the regulations must be finalized within 180 days after the regulations are published. Given the scope of the impact, this may be a short timeframe in which lenders need to be actively monitoring the progress. Because TILA compliance is enforced by the institution's federal regulator, the Act will also be enforced by each institution's existing regulator.

The Act requires three sets of disclosures that apply during the marketing of private educational loans. These disclosures are in addition to the TILA disclosures already required. The First set of disclosures is required at application or a solicitation. The language of the Act tracks fairly closely the definition of "solicitation" in Regulation Z credit card provisions (i.e., an offer to open an account that does not require the consumer to complete an application, e.g., pre-approved credit offer). There are eighteen items that need to be covered in the first set of disclosures. These address product features, co-borrowers, default terms, fees, term, interest accrual during enrollment, payment deferral options, general eligibility criteria, and an example of the total cost of financing over the life of the loan (making certain assumptions), among others. Rates must be disclosed as fixed, variable and the terms under which there is an adjustment. The CBA is gathering issues from its members to submit to Congress for consideration.

The second set of disclosures constitute "cautionary advice" terms and are due at the time of application submission. Borrowers have 30 days to consummate the transaction anytime after approval and receipt of the loan approval disclosures (borrowers may accept sooner). During that period no terms of the loan may be changed. The cautionary advice includes items to encourage students and parents to first seek out "free money" and "cheap money" before applying for private loans. This requirement informs students that school specific benefits may be available that are not detailed in the disclosures. Schools sometimes use leverage with lenders to obtain discounted rates. Borrowers must be told that they might qualify for other loans instead of private loans and that fixed interest rate loans might also be available. The disclosures require notice that the Department of Education has additional information about student loans. Finally, the disclosure must contain a description of a 30 day waiting period between the time of approval and acceptance. The lender must obtain a written acknowledgement that the consumer has read and understood the disclosure.

The third set of disclosures address consummation of the loans and are provided contemporaneously with "consummation of a private educational loan". These contain a three business day right to cancel without penalty. Further there is to be no disbursement during the cancellation period and the lender must give notice of the approved loan amount to the school. This latter requirement has been controversial due to financial privacy issues and a concern that schools will work less hard to find other student aid knowing that private loan money is available instead and thus students might be taking on more private debt than necessary.

5. Post *Juarez v. Arcadia Financial* (analysis). Bruce Belton from Tri Counties Bank provided a follow up report on the recent Fourth District decision in *Juarez v. Arcadia Financial Ltd.* (2007) 152 Cal. App. 4th 889, a copy of which was attached to the August 2007 minutes, as follows. Bruce's bank has developed a form of "Notice of Intent" with the assistance of outside counsel in an attempt fully comply with the *Juarez* decision. A copy of the proposed notice form was distributed to members with the Agenda and materials. The notice is designed to be entirely self-contained, that is, requiring no verbal contact between borrower and lender, and which

would allow the borrower to determine their precise financial obligation to the lender from the information presented on the form. Both the reinstatement and redemption scenarios are itemized on the form. The form also recites verbatim the various criteria under which reinstatement is not permitted under Reese-Levering and allows for check box selection when applicable. Finally, because Reese-Levering requires compliance with Article 9 of the Commercial Code, the proposed form includes a complete "safe-harbor" notice as allowed by section 9614. All in, the form now comprises four pages of 10 point, or smaller type, and much of the material is repeated as necessary in various sections. The uncertainty of compliance with this Act given the Juarez case would make adoption of a safe harbor form as part of Reese-Levering a valuable tool for lenders.

6. Quartz vs. Mullen Brothers. Bruce Belton reported on the June 2007 opinion issued in *Quartz v. Mullen Brothers* (2007) 151 Cal. App. 4th 901, also out of the Fourth District Court of Appeal (copy attached). The plaintiff in the case is an auto auction yard that sold vehicles to a dealer without delivering title certificates. The dealer then sold the vehicles to consumers and sold the consumer contracts to Mullen (the lender). The dealer failed to pay Quartz for the vehicles and Quartz refused to issue title certificates to Mullen. The lender sued Quartz for the title certificates on various Commercial Code theories, alleging that it was entitled to its security interest in the vehicles notwithstanding the lack of compliance with the Vehicle Code to perfect its security interest. The Court confirmed that the Vehicle Code is the exclusive means by which a lender may perfect its security interest in motor vehicles. Thus, Mullen was required to pay Quartz again for the title certificates. Lenders who purchase auto dealer contracts for used vehicles and are not assured that the prior lienholder is paid off, then take subject to the risk that they will not obtain a perfected security interest upon purchase of the contract. Given the prevailing practice in the industry and the inherent delays in the DMV registration system, a practical solution to mitigate for this risk will not likely be forthcoming.

7. Update on Fair Credit Reporting: Affiliate sharing rule and red flags on identity theft. Maureen Young reported that two final rules under the FACT Act relate to affiliate marketing restrictions and controls over programs to identify risk flags for identity theft. The statute prohibits institutions from sharing marketing information with its affiliates without providing the consumer an opportunity to opt-out. The rule simply adds some detail to the existing statutory provisions and recognizes that SB-1 is preempted by federal law. The rule applies to marketing information for product or services, and eligibility qualifying consumers for same. Exceptions to the rule are also contained in the regulation and allow sharing with an affiliate if the consumer has a preexisting business relationship (a financial contract, e.g., active account), or has a prior relationship within 18 months prior to sharing. Sharing is allowed if there is request for a solicitation. The contents of the opt-out notice are specified, and the rules include model notices (and institutions should probably follow these verbatim although deviation is permitted).

Regulation was also finalized on the red flags for identity theft. Banks and creditors, including users and furnishers of credit reports (e.g., retailers) are subject to FCRA. The rule requires a written identity theft prevention program, designed to: detect and prevent patterns of identity theft throughout the institution. The program must contain measurable steps to identify discrepancies in addresses (similar to CIP). Covered banks and creditors must also adopt a risk-based identity theft program deploying appropriate policies and procedures. There are 26 elements to be addressed in Appendix J to the rule; there must be response programs in place (e.g., customer notice) and the program must be subject to annual board review and updated as there are changes in the marketplace. The regulators will take about 2 years before they would likely pursue enforcement actions, but will be reviewing institutions to determine that they have

adopted written policies and procedures. Absent adopting a written policy, regulators may view this as per se deficiency.

8. Webinars Made Easy. Morris Hirsch, Executive Committee Liaison reported on presenting Webinars by Committee members. A Webinar consists of a live telephone conference call with simultaneous computer-based slide presentation (e.g., Power Point). These programs are an excellent way to make the Committee more visible and also generate revenues for the Business Law Section. The Financial Institution Committee has a history of producing excellent programs and the Webinars would be a good addition to the menu of available choices for presentation and make the excellent information presented in regular meetings available to the general membership. The FIC has not yet produced a Webinar. Attached is a checklist of items to be completed in order to submit materials. Susan Orloff can assist with the presentation and should be contacted for further information about submission and scheduling. A demonstration can also be arranged on request.

9. Open Meeting: Other Items of Interest. For the January meeting, Elaine Lindenmayer will report on Regulation R. Jan Aniel will report on the American Express Visa settlement. Maureen Young will report on internet gambling. Neil Rubenstein advised the Committee and guests that California law changed the Notary Acknowledgement form effective January 1, 2008. He will send an email to Meg for distribution to the members. Meg noted that there is opportunity for members to publish in the Business Law Section News. Anyone interested in submitting an article should contact Meg for further information. Legislative Day in Sacramento will be held March 11, 2008 and will include participation by members of the Consumer Financial Services Committee. Finally, Meg announced that the annual CBA Bank Counsel Seminar will be held on February 27 and 28 at the Stanford Court Hotel in San Francisco.

19. Adjournment. The meeting was adjourned at 11:45. The next regular meeting will be January 8, 2008 at the usual locations.

BILL NUMBER: SB 385 AMENDED
BILL TEXT

AMENDED IN SENATE MARCH 26, 2007

INTRODUCED BY Senator Machado

FEBRUARY 21, 2007

An act to add Section ~~10248.7~~ 10240.3 to the Business and Professions Code, to add Sections 215.5, 22169, and 50333 to the Financial Code, and to add Section 13984 to the Government Code, relating to mortgages.

LEGISLATIVE COUNSEL'S DIGEST

SB 385, as amended, Machado. Nontraditional mortgage products.

The Business, Transportation and Housing Agency consists of various agencies, including, but not limited to, the Department of Corporations, the Department of Real Estate, and the Department of Financial Institutions. The agency is under the supervision of the Secretary of Business, Transportation and Housing.

Under existing law, state financial institutions are regulated by the Department of Financial Institutions. Other entities that engage in the business of making or brokering residential mortgage loans, including, but not limited to, real estate brokers and residential mortgage lenders, are regulated by the Department of Corporations under the California Finance Lenders Law or the California Residential Mortgage Lending Act or by the Department of Real Estate under the Real Estate Law. Existing law provides that willful violations of the provisions governing real estate brokers and residential mortgage lenders are crimes. Federal financial institution regulatory agencies and the Conference of State Bank Supervisors, together with the American Association of Residential Mortgage Regulators, have each published guidance on nontraditional mortgage product risks.

This bill would require the Commissioner of Financial Institutions to ~~issue regulations applying~~ apply that guidance to all ~~state-regulated~~ state-regulated financial institutions, including, but not limited to, privately insured, state-chartered credit unions, and would authorize the commissioner to issue emergency and final regulations ~~in that regard~~ for clarification purposes, as specified. The bill would also require the Commissioner of Real Estate and the Commissioner of Corporations to ~~adopt regulations or rules applying~~ apply the guidance to real estate brokers and licensees, respectively, and would ~~require~~ authorize those commissioners to adopt emergency and final regulations or rules ~~in that regard~~ for clarification purposes, as specified. The bill would require the Secretary of Business, Transportation and Housing to ensure that these commissioners ~~adopt those regulations or rules in a consistent manner~~ coordinate their policymaking and rulemaking efforts.

This bill would also require specified financial institutions,

specified real estate brokers, finance lenders, and residential mortgage lenders to adopt and adhere to policies and procedures that are reasonably intended to achieve the objectives set forth in the guidance. Because a willful violation of these provisions with respect to real estate brokers and residential mortgage lenders would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: ~~no~~ yes .

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares that ~~uniform application of~~ the Interagency Guidance on Nontraditional Mortgage Product Risks issued in September 2006 by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration, and the guidance on nontraditional mortgage product risks issued in November 2006 by the Conference of State Bank Supervisors and the American Association of Residential Mortgage ~~Regulators to both federal and state licensees is critical to protect borrowers and lenders.~~ Regulators contain important risk management and consumer protection principles.

(b) The Legislature finds and declares that consistent application of the guidance described in subdivision (a) to state-regulated persons and institutions engaged in the brokering, originating, servicing, underwriting, and issuance of nontraditional mortgage products is critical to protect borrowers and lenders.

~~—(b)~~

(c) It is the intent of the Legislature that the Department of Real Estate, the Department of Financial Institutions, and the Department of Corporations take steps to ensure that state-licensed mortgage lenders and brokers are aware of the existence and content of the guidance described in subdivision (a) as soon as possible and ~~that lenders and brokers are encouraged to comply with the guidance before formal regulations are adopted requiring them to do so.~~ that guidance at the earliest possible date.

SEC. 2. Section ~~10248.7~~ 10240.3 is added to the Business and Professions Code, to read:

~~10248.7.~~ 10240.3. (a) The commissioner shall ~~adopt regulations applying~~ apply the guidance on nontraditional mortgage product risks published on November 14, 2006, by the Conference of State Bank Supervisors and the American Association of Residential Mortgage ~~Regulators to real estate brokers. The regulations shall include subsequent amendments to that guidance.~~ Regulators, together with any subsequent amendment to, clarification of, or interpretation of that guidance, to real estate brokers acting within the meaning of subdivision (d) of Section 10131.

(b) The commissioner ~~shall adopt emergency regulations to implement~~ may adopt emergency and final regulations to clarify the application of this section as soon as possible.

(c) A real estate broker acting within the meaning of subdivision (d) of Section 10131 shall adopt and adhere to policies and procedures that are reasonably intended to achieve the objectives set forth in the guidance described in subdivision (a).

SEC. 3. Section 215.5 is added to the Financial Code, to read:

215.5. (a) The commissioner shall ~~issue regulations applying~~ apply the Interagency Guidance on Nontraditional Mortgage Product ~~Risks published on October 4, 2006, by Office of the Comptroller of the Currency, Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, Treasury, and the National Credit Union Administration to state regulated financial institutions. The regulations shall include subsequent amendments to that guidance.~~ Risks issued in September 2006 by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration, together with any subsequent amendment to, clarification of, or interpretation of, that guidance, to state-regulated financial institutions, including, but not limited to, privately insured, state-chartered credit unions.

(b) The commissioner ~~shall issue emergency regulations to implement~~ may issue emergency and final regulations to clarify the application of this section as soon as possible.

(c) A bank or credit union to which the commissioner applies the guidance described in subdivision (a) shall adopt and adhere to policies and procedures that are reasonably intended to achieve the objectives set forth in that guidance.

SEC. 4. Section 22169 is added to the Financial Code, to read:

22169. (a) The commissioner shall ~~make regulations applying~~ apply the guidance on nontraditional mortgage product risks published on November 14, 2006, by the Conference of State Bank Supervisors and the American Association of Residential Mortgage ~~Regulators to licensees. The regulations shall include subsequent amendments to that guidance.~~ Regulators, together with any subsequent amendment to, clarification of, or interpretation of that guidance, to licensees.

(b) The commissioner ~~shall make emergency regulations to implement~~ may adopt emergency and final regulations to clarify the application of this section as soon as possible.

(c) A licensee shall adopt and adhere to policies and procedures that are reasonably intended to achieve the objectives set forth in the guidance described in subdivision (a).

SEC. 5. Section 50333 is added to the Financial Code, to read:

50333. (a) The commissioner shall ~~promulgate rules applying~~ apply the guidance on nontraditional mortgage product risks published on November 14, 2006, by the Conference of State Bank Supervisors and the American Association of Residential Mortgage ~~Regulators to licensees. The regulations shall include subsequent amendments to that guidance.~~ Regulators, together with any subsequent amendment to, clarification of, or interpretation of that guidance, to licensees.

(b) The commissioner ~~shall promulgate emergency rules to implement~~ may adopt emergency and final rules to clarify the application of this section as soon as possible.

(c) A licensee shall adopt and adhere to policies and procedures that are reasonably intended to achieve the objectives set forth in the guidance described in subdivision (a).

SEC. 6. Section 13984 is added to the Government Code, to read:

13984. In order to ensure that ~~the guidances specified in Section 10248.7~~ 10240.3 of the Business and Professions Code and Sections 215.5, 22169, and 50333 of the Financial Code are applied ~~uniformly~~ consistently to all California entities engaged in the brokering, originating, servicing, underwriting, and issuance of nontraditional mortgage products, the secretary shall ensure that the Commissioner of Real Estate, the Commissioner of Financial Institutions, and the Commissioner of Corporations ~~adopt and implement in a consistent manner regulations or rules applying the guidances.~~ coordinate their policymaking and rulemaking efforts.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.



State Of California
Business, Transportation And Housing Agency
DEPARTMENT OF CORPORATIONS
California's Investment and Financing Authority

www.corp.ca.gov

Arnold Schwarzenegger
Governor

Preston DuFauchard
California Corporations Commissioner

DATE: SEPTEMBER 5, 2007

RELEASE No. 61-FS

**ARRANGING WORKOUTS FOR BORROWERS, PREPARING FOR
SPECIAL SERVICING REPORTS TO THE COMMISSIONER,
AND ESTABLISHING A WORKING GROUP IN CONNECTION WITH
NONTRADITIONAL AND OTHER MORTGAGE LOAN PRODUCTS**

This Release encourages lenders and servicers of loans under the California Finance Lenders Law and the California Residential Mortgage Lending Act to provide appropriate workout arrangements with financially stressed borrowers, such as providing loan modifications and other workout arrangements. This Release also provides notification of a special report requested by the Department of Corporations ("Department") in connection with workout arrangements being arranged by licensees performing loan-servicing activities. Additionally, this Release announces plans to form a new working group to advise the Department, and provide further assistance to help measure licensee performance in providing workout arrangements to borrowers.

Workout Arrangements With Financially Stressed Borrowers

The California Corporations Commissioner encourages licensees to work with financially stressed homeowners to provide, as necessary and appropriate, workout arrangements that provide modified terms or converted loan products with predictable and manageable payments. Loss mitigation techniques for servicers have proven useful to preserve homeownership and to avoid foreclosure. Accordingly, the Commissioner urges servicers to identify borrowers who are potentially in distress early, to notify them of reset provisions, and to work with them as appropriate, consistent with the following additional statements dated September 4, 2007: (1) the "Statement on Loss Strategies for Servicers of Residential Mortgages" published by the Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Conference of State Bank Supervisors ("CSBS"); and (2) the Joint Release published by the FDIC, the CSBS, and the American Association of Residential Mortgage Regulators ("AARMR") entitled "FDIC,

CSBS and AARMR Suggest Servicers Avoid Debt-to-Income (DTI) Ratios Above 50 Percent for Modified Obligations."

Special Report Regarding Adherence to Homeownership Preservation Principles

In a separate form that will be sent to licensees, the Department will be requesting information by December 31, 2007, relating to compliance by loan servicers with principles dated May 2, 2007 by the United States Senate Committee on Banking, Housing and Urban Affairs and entitled, "Homeownership Preservation Statement of Principles" (hereinafter the "Principles"). In general, six of these important Principles impacting licensees (exclusive of those that apply to government sponsored entities) are as follows:

1. Early Contact and Evaluation: Servicers should attempt to contact subprime adjustable rate mortgage (ARM) borrowers prior to the loan reset to determine whether the borrower can afford the new, higher payments, or whether the higher payments create a reasonable risk of default. If it is clear, after reviewing all the available facts and circumstances, that the borrower will be unable to make the new payment when the loan resets, then the servicer may presume that default on the mortgage is reasonably likely to occur. This conclusion may permit the servicer to modify the loan.

2. Modify to Create Longterm Affordability: If the borrower cannot afford the reset payment (as described above), servicers should seek to modify loans prior to the reset. The objective of the modification should be to create a permanent solution for the borrower to ensure that the loan is sustainable for the life of the loan rather than, for example, deferring the rate reset period. Such modification options should include, as appropriate, one or more of the following:

- Change of terms. Switching from an adjustable to a fixed rate loan at an affordable rate by, for example, making the introductory rate permanent.
- Reduce the interest rate. Reducing the interest rate is one way to assist a borrower to afford the mortgage. Ability to repay should take into account the borrower's total debt-to-income ratio, including factoring in the costs of taxes and insurance.
- Reduce principal. Reducing the loan principal in order to ensure affordability and a continued revenue stream on the loan.
- Reamortize the loan. Reamortizing the loan to account for any changed loan terms or to make the payments more affordable.
- Escrows. If possible, servicers should begin to escrow for taxes and insurance as part of the modification process to ensure the home loan will remain sustainable for the life of the loan.

3. Dedicated Teams or Resources: Servicers should adopt a modification policy so that modifications can be done on the scale required in the time required by dedicated teams or dedicated resources. Where feasible, servicers should partner with

experienced third party counselors and non-profits to make outreach as effective as possible.

4. Low-Cost Refinancing: For those who are eligible, refinancing to prime loans should be made in as streamlined and low-cost fashion as possible.

5. Maximize Success, Minimize Damage: The participants understand that not every foreclosure can be prevented nor every home saved. All parties should work to minimize the damage to borrowers, communities, and the mortgage market when saving the home is not possible.

6. Accountability: A system should be developed for measuring progress on achieving the principles outlined above so that the parties can track progress, and so that the process is as transparent as possible.

Many Department licensees have already agreed to the above Principles including, but not limited to, Countrywide, Litton Loan Servicing, HSBC, and others. For those licensees that have not yet adopted these Principles, the Commissioner encourages them to adopt and comply with the Principles on an ongoing basis and to inform the Department accordingly. A special form being developed by the Department will be designed to assist in monitoring licensee compliance with these Principles as well as current laws, and will help provide a quick overview of ongoing efforts to help financially distressed borrowers receive modified loan products. Although the above-referenced Principles are designed to address certain adjustable rate mortgage loans, it is anticipated that licensees will be asked to answer questions relating to other loan types as well.

Establishing A Mortgage Loan Working Group

In addition, the Department will convene a working group by October 31, 2007, comprised of interested stakeholders from industry and consumer groups. Among other things, this group will help to advise the Department (including with regard to the special form described above), and to analyze the efficacy of assistance provided to financially stressed borrowers including, but not limited to, a more comprehensive report to measure licensee performance in providing workout arrangements.

For Further Information

Copies of the above-referenced documents, including the Principles published by the United States Senate Committee on Banking, Housing and Urban Affairs and entitled, "Homeownership Preservation Statement of Principles," the federal financial agencies' "Statement on Loss Strategies for Servicers of Residential Mortgages," and the Joint Release of FDIC, CSBS and AARMR, are all available on the Department's web page at www.corp.ca.gov in the Education and Outreach link under the heading of Nontraditional Mortgage and Loan Information.

Should you have any questions concerning this Release, please contact the Department's Consumer Resource Center at 1-866-275-2677.

Preston DuFauchard
California Corporations Commissioner

By _____

TIMOTHY L. Le BAS
Deputy Commissioner
Office of Legislation and Policy

Managers' Amendment

AMENDMENT NO. _____ Calendar No. _____

Purpose: To provide a complete substitute.

IN THE SENATE OF THE UNITED STATES—110th Cong., 1st Sess.

S.

To establish requirements for private lenders to protect student borrowers receiving private educational loans.

Referred to the Committee on _____ and ordered to be printed _____

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. DODD (for himself and Mr. SHERIDY)

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:

3 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

- 4 (a) SHORT TITLE.—This Act may be cited as the
- 5 "Private Student Loan Transparency and Improvement
- 6 Act of 2007".
- 7 (b) TABLE OF CONTENTS.—The table of contents for
- 8 this Act is as follows:

Sec. 1. Short title; table of contents.

- Sec. 2. Definitions.
- Sec. 3. Regulations.
- Sec. 4. Effective dates.

TITLE I—PREVENTING UNFAIR AND DECEPTIVE PRIVATE EDUCATIONAL LENDING PRACTICES AND ELIMINATING CONFLICTS OF INTEREST

- Sec. 101. Amendment to the Truth in Lending Act.
- Sec. 102. Civil liability.
- Sec. 103. Criminal enforcement.

TITLE II—IMPROVED DISCLOSURES FOR PRIVATE EDUCATIONAL LOANS

- Sec. 201. Private educational loan disclosures and limitations.
- Sec. 202. Application of Truth in Lending Act to all private educational loans.

TITLE III—COLLEGE AFFORDABILITY

- Sec. 301. Community Reinvestment Act credit for low-cost loans.

TITLE IV—FINANCIAL LITERACY

- Sec. 401. Coordinated education efforts.

TITLE V—STUDY AND REPORT ON NONINDIVIDUAL INFORMATION

- Sec. 501. Study and report on nonindividual information.

1 SEC. 2. DEFINITIONS.

- 2 As used in this Act—
- 3 (1) the term "Board" means the Board of Gov-
- 4 ernors of the Federal Reserve System;
- 5 (2) the term "covered educational institu-
- 6 tion"—
- 7 (A) means any educational institution that
- 8 offers a postsecondary educational degree, cer-
- 9 tificate, or program of study (including any in-
- 10 situation of higher education); and
- 11 (B) includes an agent or employee of the
- 12 educational institution;

1 (3) the terms "Federal banking agencies" and
 2 "appropriate Federal banking agency" have the
 3 same meanings as in section 3 of the Federal De-
 4 posit Insurance Act (12 U.S.C. 1813);
 5 (4) the term "institution of higher education"
 6 has the same meaning as in section 102 of the High-
 7 er Education Act of 1965 (20 U.S.C. 1002);
 8 (5) the term "postsecondary educational ex-
 9 penses" means any of the expenses that are included
 10 as part of the cost of attendance of a student, as de-
 11 fined under section 472 of the Higher Education Act
 12 of 1965 (20 U.S.C. 1087H);
 13 (6) the term "private educational lender"
 14 means—
 15 (A) a financial institution, as defined in
 16 section 3 of the Federal Deposit Insurance Act
 17 (12 U.S.C. 1813) that solicits, makes, or ex-
 18 tends private educational loans;
 19 (B) a Federal credit union, as defined in
 20 section 101 of the Federal Credit Union Act
 21 (12 U.S.C. 1752) that solicits, makes, or ex-
 22 tends private educational loans; and
 23 (C) any other person engaged in the busi-
 24 ness of soliciting, making, or extending private
 25 educational loans; and

1 (7) the term "private educational loan"—
 2 (A) means a loan provided by a private
 3 educational lender that—
 4 (i) is not made, insured, or guaran-
 5 teed under part B of title IV of the Higher
 6 Education Act of 1965 (20 U.S.C. 1070 et
 7 seq.); and
 8 (ii) is issued by a private educational
 9 lender expressly for postsecondary edu-
 10 cational expenses to a borrower, regardless
 11 of whether the loan is provided through the
 12 educational institution that the subject stu-
 13 dent attends or directly to the borrower
 14 from the lender; and
 15 (B) does not include an extension of credit
 16 under an open end consumer credit plan, a resi-
 17 dential mortgage transaction (as those terms
 18 are defined in section 103 of the Truth in
 19 Lending Act), or any other loan that is secured
 20 by real property or a dwelling.
 21 **SEC. 3. REGULATIONS.**
 22 The Board shall issue final regulations to implement
 23 this Act and the amendments made by this Act not later
 24 than 180 days after the date of enactment of this Act.

1 **SEC. 4. EFFECTIVE DATES.**

2 This Act and the amendments made by this Act shall
3 become effective 180 days after the date on which regula-
4 tions to carry out this Act and the amendments made by
5 this Act are issued in final form.

6 **TITLE I—PREVENTING UNFAIR**
7 **AND DECEPTIVE PRIVATE**
8 **EDUCATIONAL LENDING**
9 **PRACTICES AND ELIMI-**
10 **NATING CONFLICTS OF IN-**
11 **TEREST**

12 **SEC. 101. AMENDMENT TO THE TRUTH IN LENDING ACT.**

13 Chapter 2 of the Truth in Lending Act (15 U.S.C.
14 1631 et seq.) is amended by adding at the end the fol-
15 lowing new section:

16 **“§ 140. Preventing unfair and deceptive private edu-**

17 **cational lending practices and elimi-**
18 **nating conflicts of interest**

19 “(a) **DEFINITIONS.**—As used in this section—

20 “(1) the term ‘covered educational institu-

21 tion’ —

22 “(A) means any educational institution
23 that offers a postsecondary educational degree,
24 certificate, or program of study (including any
25 institution of higher education); and

1 “(B) includes an agent or employee of the
2 educational institution;

3 “(2) the term ‘gift’ —

4 “(A) means any gratuity, favor, discount,
5 entertainment, hospitality, loan, or other item
6 having a monetary value of more than \$10, in-
7 cluding a gift of services, transportation, lodg-
8 ing, or meals, whether provided in kind, by par-
9 chase of a ticket, payment in advance, or rein-
10 bursement after the expense has been incurred;
11 and

12 “(B) does not include—

13 “(i) standard informational material
14 related to a loan (such as a brochure);

15 “(ii) food, refreshments, training, or
16 informational material furnished to an em-
17 ployee or agent of a covered educational in-
18 stitution, as an integral part of a training
19 session or through participation in an advi-
20 sory council that is designed to improve
21 the service of the lender to the covered
22 educational institution, if such training or
23 participation contributes to the profes-
24 sional development of the employee or

1 agent of the covered educational institu-
2 tion; or

3 “(iii) favorable terms, conditions, and
4 borrower benefits on an educational loan
5 provided to a student employed by the cov-
6 ered educational institution;

7 “(3) the term ‘institution of higher education’
8 has the same meaning as in section 102 of the High-
9 er Education Act of 1965 (20 U.S.C. 1002);

10 “(4) the term ‘postsecondary educational ex-
11 penses’ means any of the expenses that are included
12 as part of the cost of attendance of a student, as de-
13 fined under section 472 of the Higher Education Act
14 of 1965 (20 U.S.C. 1087H);

15 “(5) the term ‘private educational lender’
16 means—

17 “(A) a financial institution, as defined in
18 section 3 of the Federal Deposit Insurance Act
19 (12 U.S.C. 1813) that solicits, makes, or ex-
20 tends private educational loans;

21 “(B) a Federal credit union, as defined in
22 section 101 of the Federal Credit Union Act
23 (12 U.S.C. 1762) that solicits, makes, or ex-
24 tends private educational loans; and

1 “(C) any other person engaged in the busi-
2 ness of soliciting, making, or extending private
3 educational loans;

4 “(6) the term ‘private educational loan’—

5 “(A) means a loan provided by a private
6 educational lender that—

7 “(i) is not made, insured, or guaran-
8 teed under part B of title IV of the Higher
9 Education Act of 1965 (20 U.S.C. 1070 et
10 seq.); and

11 “(ii) is issued by a private educational
12 lender expressly for postsecondary edu-
13 cational expenses to a borrower, regardless
14 of whether the loan is provided through the
15 educational institution that the subject stu-
16 dent attends or directly to the borrower
17 from the lender; and

18 “(B) does not include an extension of cred-
19 it under an open end consumer credit plan, a
20 residential mortgage transaction, or any other
21 loan that is secured by real property or a dwell-
22 ing; and

23 “(7) the term ‘revenue sharing’ means an ar-
24 rangement between a covered educational institution
25 and a private educational lender under which—

“(A) a private educational lender provides or issues private educational loans to students attending the covered educational institution or to the parents of such students;

“(B) the covered educational institution recommends to students or others the private educational lender or the private educational loans of the private educational lender; and

“(C) the private educational lender pays a fee or provides other material benefits, including profit or revenue sharing, to the covered educational institution or to the officers, employees, or agents of the covered educational institution in connection with the private educational loans provided to students attending the covered educational institution or a borrower acting on behalf of a student.

“(b) PROHIBITION ON CERTAIN GIFTS AND ARRANGEMENTS.—A private educational lender, including any officer or employer thereof, may not, directly or indirectly—

“(1) offer or provide any gift to a covered educational institution or a covered educational institution employee, nor may such covered educational institution, officer, or employee receive any such gift,

in exchange for any advantage or consideration provided to such private educational lender related to its private educational loan activities; or

“(2) engage in revenue sharing with a covered educational institution.

“(c) PROHIBITION ON CO-BRANDING.—A private educational lender may not use the name, emblem, mascot, or logo of the covered educational institution, or other words, pictures, or symbols readily identified with the covered educational institution, in the marketing of private educational loans in any way that implies that the covered educational institution endorses the private educational loans offered by the lender.

“(d) ADVISORY BOARD COMPENSATION.—Any person who is employed in the financial aid office of a covered educational institution, or who otherwise has responsibilities with respect to private educational loans or other financial aid of the institution, and who serves on an advisory board, commission, or group established by a private educational lender or group of such lenders shall be prohibited from receiving anything of value from the private educational lender or group of lenders. Nothing in this subsection shall prohibit the reimbursement of reasonable expenses incurred by an employee of a covered educational institution as part of their service on an advisory board,

11

1 commission, or group described in this subsection, subject
2 to the rules of the Board.

3 “(e) **PROHIBITION ON PREPAYMENT OR REPAYMENT**
4 **FEES OR PENALTY.**—It shall be unlawful for any private
5 educational lender to impose a fee or penalty on a bor-
6 rower, directly or indirectly, for early repayment or pre-
7 payment, of any private educational loan.”.

8 **SEC. 102. CIVIL LIABILITY.**

9 Section 130 of the Truth in Lending Act (15 U.S.C.
10 1640) is amended—

11 (1) in subsection (a)—

12 (A) in paragraph (3), by inserting “or sec-
13 tion 128(e)(6)” after “section 125”; and

14 (B) in the fourth sentence of the undesignated
15 matter at the end—

16 (i) by striking “125 or” and
17 inserting “125”; and

18 (ii) by inserting “or of section
19 128(e),” before “or for failing”; and

20 (2) in subsection (e), by inserting before the
21 first period, the following: “or, in the case of a viola-
22 tion involving a private educational loan, 1 year
23 from the date on which the first regular payment of
24 principal is due under the loan”.

12

1 **SEC. 103. CLERICAL AMENDMENT.**

2 The table of sections for chapter 2 of title I of the
3 Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended
4 by adding at the end the following:

“140. Preventing unfair and deceptive private educational lending practices and
eliminating conflicts of interest.”.

5 **TITLE II—IMPROVED DISCLOSURES FOR PRIVATE EDUCATIONAL LOANS**

8 **SEC. 201. PRIVATE EDUCATIONAL LOAN DISCLOSURES AND LIMITATIONS.**

9
10 Section 128 of the Truth in Lending Act (15 U.S.C.
11 1638) is amended by adding at the end the following:

12 “(e) **TERMS AND DISCLOSURE WITH RESPECT TO**
13 **PRIVATE EDUCATIONAL LOANS.**—

14 “(1) **DISCLOSURES REQUIRED IN PRIVATE EDUCATIONAL LOAN APPLICATIONS AND SOLICITATIONS.**—In any application for a private educational loan, or a solicitation for a private educational loan, or a solicitation for a private educational loan without requiring an application, the lender shall disclose to the borrower, clearly and conspicuously—
19
20 “(A) the potential range of rates of interest applicable to the private educational loan;
21
22 “(B) whether the rate of interest applicable to the private educational loan is fixed or
23 variable;
24

13

1 “(C) limitations on interest rate adjust-
 2 ments, both in terms of frequency and amount,
 3 or the lack thereof;

4 “(D) requirements for a co-borrower, in-
 5 cluding any changes in the applicable interest
 6 rates without a co-borrower;

7 “(E) potential finance charges, late fees,
 8 penalties, and adjustments to principal, based
 9 on defaults or late payments of the borrower;

10 “(F) fees or ranges of fees applicable to the
 11 private educational loan;

12 “(G) the term of the private educational
 13 loan;

14 “(H) whether interest will accrue while the
 15 student to whom the private educational loan
 16 relates is enrolled at an institution of higher
 17 education;

18 “(I) payment deferral options, including
 19 whether the deferment would apply to interest
 20 or principal, or both;

21 “(J) general eligibility criteria for the pri-
 22 vate educational loan;

23 “(K) an example of the total cost of the
 24 private educational loan over the life of the
 25 loan—

14

1 “(i) which shall be calculated using
 2 the principal amount and the maximum
 3 rate of interest actually offered by the
 4 lender; and

5 “(ii) calculated both with and without
 6 capitalization of interest, if that is an op-
 7 tion for postponing interest payments;

8 “(I) a statement that an institution of
 9 higher education may have school-specific edu-
 10 cational loan benefits and terms not detailed on
 11 the disclosure form;

12 “(M) that the borrower may qualify for
 13 Federal financial assistance through a program
 14 under title IV of the Higher Education Act of
 15 1965, in lieu of, or in addition to, a loan from
 16 a non-Federal source;

17 “(N) the interest rates available with re-
 18 spect to such Federal financial assistance
 19 through a program under title IV of the Higher
 20 Education Act of 1965;

21 “(O) that, as provided in paragraph (5)—
 22 “(i) the borrower shall have up to 30
 23 calendar days following the date on which
 24 the application for the private educational
 25 loan is approved and the borrower receives

15

the disclosure documents required under
this subsection for the loan to accept the
terms of the private educational loan and
consummate the transaction; and

“(ii) except for changes based on ad-
justments to the index used for a loan, the
rates and terms of the loan may not be
changed by the lender during that 30-day
period; and

“(F) such other information as the Board
shall prescribe, by rule, as necessary or ap-
propriate for consumers to make informed bor-
rowing decisions.

“(2) DISCLOSURES AT THE TIME OF PRIVATE
EDUCATIONAL LOAN APPROVAL.—Subject to the
rules of the Board, contemporaneously with the ap-
proval of a private educational loan application, and
before the loan transaction is consummated, the
lender shall disclose to the borrower, clearly and
conspicuously—

“(A) the applicable rate of interest in ef-
fect on the date of approval;

“(B) whether the rate of interest applica-
ble to the private educational loan is fixed or
variable;

16

“(C) limitations on interest rate adjust-
ments, both in terms of frequency and amount,
or the lack thereof;

“(D) the initial approved principal amount;
“(E) applicable finance charges, late fees,
penalties, and adjustments to principal, based
upon borrower defaults or late payments;

“(F) the maximum term under the private
educational loan program;

“(G) an estimate of the total amount for
repayment, at both the interest rate in effect on
the date of approval and at the maximum pos-
sible rate of interest actually offered by the
lender, to the extent that such maximum rate
may be determined, or if not, a good faith esti-
mate thereof;

“(H) any principal and interest payments
required while the student to whom the private
educational loan relates is enrolled at an insti-
tution of higher education and interest which
will accrue during such enrollment;

“(I) payment deferral options, including
whether the deferral would apply to interest
or principal, or both;

17

1 “(J) whether monthly payments are grad-
2 uated;

3 “(K) that, as provided in paragraph (5)—

4 “(i) the borrower shall have up to 30
5 calendar days following the date on which
6 the application for the private educational
7 loan is approved and the borrower receives
8 the disclosure documents required under
9 this subsection for the loan to accept the
10 terms of the private educational loan and
11 consummate the transaction; and

12 “(ii) except for changes based on ad-
13 justments to the index used for a loan, the
14 rates and terms of the loan may not be
15 changed by the lender during that 30-day
16 period;

17 “(L) that the borrower may qualify for
18 Federal financial assistance through a program
19 under title IV of the Higher Education Act of
20 1965, in lieu of, or in addition to, a loan from
21 a non-Federal source;

22 “(M) the interest rates available with re-
23 spect to such Federal financial assistance
24 through a program under title IV of the Higher
25 Education Act of 1965;

18

1 “(N) the maximum monthly payment, cal-
2 culated using the maximum rate of interest ac-
3 tually offered by the lender, to the extent that
4 such maximum rate may be determined, or if
5 not, a good faith estimate thereof; and

6 “(O) such other information as the Board
7 shall prescribe, by rule, as necessary or appro-
8 priate for consumers to make informed bor-
9 rowing decisions.

10 “(3) DISCLOSURES AT THE TIME OF PRIVATE
11 EDUCATIONAL LOAN CONSUMMATION.—Subject to
12 the rules of the Board, contemporaneously with the
13 consummation of a private educational loan, the
14 lender shall make each of the disclosures described
15 in subparagraphs (A) through (J) and (L) through
16 (O) of paragraph (2) to the borrower.

17 “(4) FORMAT OF DISCLOSURES.—Disclosures
18 required under paragraphs (1), (2), and (3) shall ap-
19 pear in a clearly legible, uniform format, subject to
20 section 122(c).

21 “(5) EFFECTIVE PERIOD OF APPROVED RATE
22 OF INTEREST AND LOAN TERMS.—

23 “(A) IN GENERAL.—With respect to a pri-
24 vate educational loan, the borrower shall have
25 the right to accept the terms of the loan and

19

1 consummate the transaction at any time within
 2 30 calendar days following the date on which
 3 the application for the private educational loan
 4 is approved and the borrower receives the dis-
 5 closure documents required under this sub-
 6 section for the loan, and the rates and terms of
 7 the loan may not be changed by the lender dur-
 8 ing that period, subject to the rules of the
 9 Board.

10 “(B) PROHIBITION ON CHANGES.—Except
 11 for changes based on adjustments to the index
 12 used for a loan, the rates and terms of the loan
 13 may not be changed by the lender prior to the
 14 earlier of—

15 “(i) the date of acceptance of the
 16 terms of the loan and consummation of the
 17 transaction by the borrower, as described
 18 in subparagraph (A); or

19 “(ii) the expiration of the 30-day pe-
 20 riod referred to in subparagraph (A).

21 “(C) PROHIBITION ON DISBURSEMENT.—
 22 No funds may be disbursed with respect to a
 23 private educational loan until acceptance of the
 24 loan by the borrower under subparagraph (A)

20

1 and the expiration of the 3-day period under
 2 paragraph (6).

3 “(6) EFFECT TO CANCEL.—With respect to a
 4 private educational loan, the borrower may cancel
 5 the loan, without penalty to the borrower, at any
 6 time within 3 business days of the date on which the
 7 loan is consummated, subject to the rules of the
 8 Board. No funds may be transferred to the borrower
 9 during that 3-day period.

10 “(7) DEFINITIONS.—For purposes of this sub-
 11 section—

12 “(A) the term ‘institution of higher edu-
 13 cation’ has the same meaning as in section 102
 14 of the Higher Education Act of 1965 (20
 15 U.S.C. 1002);

16 “(B) the term ‘private educational lender’
 17 means—

18 “(i) a financial institution, as defined
 19 in section 3 of the Federal Deposit Insur-
 20 ance Act (12 U.S.C. 1813) that solicits,
 21 makes, or extends private educational
 22 loans;

23 “(ii) a Federal credit union, as de-
 24 fined in section 101 of the Federal Credit
 25 Union Act (12 U.S.C. 1752) that solicits,

21

1 makes, or extends private educational
2 loans; and

3 “(iii) any other person engaged in the
4 business of soliciting, making, or extending
5 private educational loans; and

6 “(C) the term ‘private educational loan’—

7 “(i) means a loan provided by a pri-
8 vate educational lender that—

9 “(1) is not made, insured, or
10 guaranteed under part B of title IV of
11 the Higher Education Act of 1965 (20
12 U.S.C. 1070 et seq.); and

13 “(II) is issued by a private edu-
14 cational lender expressly for postsec-
15 ondary educational expenses to a bor-
16 rower, regardless of whether the loan
17 is provided through the educational
18 institution that the subject student at-
19 tends or directly to the borrower from
20 the lender; and

21 “(ii) does not include an extension of
22 credit under an open end consumer credit
23 plan, a residential mortgage transaction, or
24 any other loan that is secured by real
25 property or a dwelling.”

22

1 **SEC. 202. APPLICATION OF TRUTH IN LENDING ACT TO ALL**
2 **PRIVATE EDUCATIONAL LOANS.**

3 Section 104(3) of the Truth in Lending Act (15
4 U.S.C. 1603(3)) is amended by inserting “and other than
5 private educational loans (as that term is defined in sec-
6 tion 140(a))” after “consumer”.

7 **TITLE III—COLLEGE** 8 **AFORDABILITY**

9 **SEC. 301. COMMUNITY REINVESTMENT ACT CREDIT FOR**
10 **LOW-COST LOANS.**

11 (a) IN GENERAL.—The appropriate Federal financial
12 supervisory agency shall give a private educational lender
13 credit toward meeting the credit needs of its community
14 for purposes of the Community Reinvestment Act of 1977,
15 for making low-cost private educational loans to low-in-
16 come borrowers.

17 (b) REGULATIONS.—The Board shall develop regula-
18 tions determining which private educational loans are
19 available for the credit under this section.

20 (c) DEFINITION.—As used in this section, the term
21 “appropriate Federal financial supervisory agency” has
22 the same meaning as in section 803 of the Community
23 Reinvestment Act of 1977 (12 U.S.C. 2902).

1 **TITLE IV—FINANCIAL LITERACY**

2 **SEC. 401. COORDINATED EDUCATION EFFORTS.**

3 (a) IN GENERAL.—The Secretary of the Treasury (in
4 this section referred to as the “Secretary”), in coordina-
5 tion with the Secretary of Education, the Secretary of Ag-
6 riculture (with respect to land grant covered educational
7 institutions), and any other appropriate agency that is a
8 member of the Financial Literacy and Education Commis-
9 sion established under the Financial Literacy and Edu-
10 cation Improvement Act (20 U.S.C. 9701 et. seq.), shall
11 seek to enhance financial literacy among students at insti-
12 tutions of higher education through—
13 (1) the development of initiatives, programs,
14 and curricula that improve student awareness of the
15 short- and long-term costs associated with edu-
16 cational loans and other debt assumed while in col-
17 lege, their repayment obligations, and their rights as
18 borrowers; and
19 (2) assisting such students in navigating the fi-
20 nancial aid process.
21 (b) DUTIES.—For purposes of this section, the Sec-
22 retary, working in conjunction with the Secretary of Edu-
23 cation, the Secretary of Agriculture, and the Financial
24 Literacy and Education Commission, shall—

1 (1) identify programs that promote or enhance
2 financial literacy for college students, with specific
3 emphasis on programs that impart the knowledge
4 and ability for students to best navigate the finan-
5 cial aid process, including those that involve partner-
6 ships between nonprofit organizations, colleges and
7 universities, State and local governments, and stu-
8 dent organizations;
9 (2) evaluate the effectiveness of such programs
10 in terms of measured results, including positive be-
11 havioral change among college students;
12 (3) promote the programs identified as being
13 the most effective; and
14 (4) encourage institutions of higher education
15 to implement financial education programs for their
16 students, including those that have the highest eval-
17 uations.
18 (c) REPORT.—
19 (1) IN GENERAL.—Not later than 2 years after
20 the date of enactment of this Act, the Financial Lit-
21 eracy and Education Commission shall submit a re-
22 port to Congress on the state of financial education
23 among students at institutions of higher education.
24 (2) CONTENT.—The report required by this
25 subsection shall include a description of progress

1 made in enhancing financial education with respect
 2 to student understanding of financial aid, including
 3 the programs and evaluations required by this sec-
 4 tion.

5 (3) APPEARANCE BEFORE CONGRESS.—The
 6 Secretary shall, upon request, provide testimony be-
 7 fore the Committee on Banking, Housing, and
 8 Urban Affairs of the Senate concerning the report
 9 required by this subsection.

10 **TITLE V—STUDY AND REPORT** 11 **ON NONINDIVIDUAL INFOR-** 12 **MATION**

13 **SEC. 501. STUDY AND REPORT ON NONINDIVIDUAL INFOR-** 14 **MATION.**

15 (a) STUDY.—The Comptroller General of the United
 16 States (in this section referred to as the “Comptroller”)
 17 conduct a study—

18 (1) on the impact on and benefits to borrowers
 19 of the inclusion of nonindividual factors, including
 20 cohort default rate, accreditation, and graduation
 21 rate at institutions of higher education, used in the
 22 underwriting criteria to determine the pricing of pri-
 23 vate educational loans;
 24 (2) to examine whether and to what extent the
 25 inclusion of such nonindividual factors—

1 (A) increases access to private educational
 2 loans for borrowers who lack credit history or
 3 results in less favorable rates for such bor-
 4 rowers; and

5 (B) impacts the types of private edu-
 6 cational loan products and rates available at
 7 certain institutions of higher education, includ-
 8 ing a comparison of such impact—

9 (i) on private and public institutions;
 10 and

11 (ii) on historically Black colleges and
 12 universities (defined for purposes of this
 13 section as a “part B institution”, within
 14 the meaning of section 322 of the Higher
 15 Education Act of 1965 (20 U.S.C. 1061))
 16 and other colleges and universities; and

17 (3) to assess the extent to which the use of
 18 such nonindividual factors in underwriting may have
 19 a disparate impact on the pricing of private edu-
 20 cational loans, based on gender, race, income level,
 21 and institution of higher education.

22 (b) REPORT.—Not later than 1 year after the date
 23 of enactment of this Act, the Comptroller shall submit a
 24 report to Congress on the results of the study required
 25 by this section.

151 Cal.App.4th 901, 61 Cal.Rptr.3d 54, 07 Cal. Daily Op. Serv. 6300, 2007 Daily Journal D.A.R. 7910
(Cite as: 151 Cal.App.4th 901)

C

Quartz of Southern California, Inc. v. Mullen Bros.,
Inc.
Cal.App. 4 Dist., 2007.

Court of Appeal, Fourth District, Division 3,
California.

QUARTZ OF SOUTHERN CALIFORNIA, INC.,
Plaintiff and Appellant,

v.

MULLEN BROS., INC., Defendant and Appellant.
Nos. G036228, G036343.

May 31, 2007.

Background: Wholesale used car dealer, which had sold vehicles to second dealer, sought declaratory relief against second dealer's assignee of conditional sales contracts between second dealer and retailer buyers of vehicles, alleging assignee was required to pay plaintiff dealer for the vehicles, in order to obtain certificates of title retained by plaintiff dealer. Assignee brought claims against second dealer for negligent misrepresentation and breach of contract, and against plaintiff dealer for quiet title. The Superior Court, Orange County, W. Michael Hayes, J., found that plaintiff dealer was lawful holder of certificates of title, but that assignee was not required to pay plaintiff dealer for the vehicles after second dealer had failed to do so. Plaintiff dealer and assignee appealed.

Holdings: The Court of Appeal, Sills, P.J., held that:

(1) assignee did not have perfected security interest in the vehicles, and

(2) assignee was required to pay plaintiff dealer for the vehicles.

Affirmed in part, reversed in part, and remanded.
West Headnotes

[1] Appeal and Error 30 ⚡842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k838 Questions Considered

30k842 Review Dependent on Whether
Questions Are of Law or of Fact

30k842(1) k. In General. Most
Cited Cases

Question of title to vehicles, in dispute between wholesale used car dealer which had sold vehicles to second dealer, and second dealer's assignee with respect to conditional sales contracts between second dealer and retailer buyers of the vehicles, rested on statutory construction and application of that construction to set of undisputed facts, and accordingly, it was a question of law which appellate court would review independently from the trial court.

[2] Automobiles 48A ⚡19

48A Automobiles

48AI Control, Regulation, and Use in General

48Ak19 k. Sale or Transfer. Most Cited
Cases

While vehicles qualify as "goods" under Sales division of California Uniform Commercial Code (UCC), sales of vehicles are excluded from the Sales division of the UCC, because sale and recording of sale of vehicles are regulated by California Vehicle Code. West's Ann.Cal.Com.Code §§ 2101, 2102, 2105(1), 2401, 2403; West's Ann.Cal.Vehicle Code § 5600.

[3] Secured Transactions 349A ⚡7

349A Secured Transactions

349AI Nature, Requisites, and Validity

349AI(A) Nature and Essentials

349Ak3 What Law Governs

349Ak7 k. Certificate of Title,
Property Covered By. Most Cited Cases

Secured Transactions 349A ⚡81

349A Secured Transactions

349AII Perfection of Security Interest

349Ak81 k. In General. Most Cited Cases

California Vehicle Code provides exclusive method for perfecting a security interest in a vehicle not constituting inventory, and thus, the provisions of the California Uniform Commercial Code (UCC) regarding secured transactions do not come into play to determine the rights of competing parties until the security interest is perfected under the Vehicle Code. West's Ann.Cal.Com.Code § 9102(a)(11, 72); West's Ann.Cal.Vehicle Code §§ 6300, 6301, 6303.

[4] Secured Transactions 349A ⚔87

349A Secured Transactions

349AII Perfection of Security Interest

349Ak87 k. Notation on Certificate of Title.

Most Cited Cases

Secured Transactions 349A ⚔184

349A Secured Transactions

349AV Assignments of Security Interests and Assignments Creating Security Interests

349Ak184 k. Rights and Liabilities of Parties. Most Cited Cases

Assignee of conditional sales contracts between used car dealer and retailer buyers of vehicles did not have perfected security interest in the vehicles under the California Uniform Commercial Code (UCC), where dealer had not followed the California Vehicle Code's exclusive method for perfecting a security interest in a vehicle not constituting inventory. West's Ann.Cal.Com.Code § 9102(a)(11, 72); West's Ann.Cal.Vehicle Code §§ 6300, 6301, 6303.

See 4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 235 et seq.; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Secured Transactions in Personal Property, § 47; Cal. Jur. 3d, Automobiles, § 119 et seq.

[5] Secured Transactions 349A ⚔184

349A Secured Transactions

349AV Assignments of Security Interests and Assignments Creating Security Interests

349Ak184 k. Rights and Liabilities of

Parties. Most Cited Cases

Assignee of conditional sales contracts between first used car dealer and retailer buyers of vehicles, which assignee did not have perfected security interest in the vehicles under the California Uniform Commercial Code (UCC) because first dealer had not followed California Vehicle Code's exclusive method for perfecting a security interest in a vehicle not constituting inventory, was required to pay a second dealer, which had sold the vehicles to first dealer and had acquired certificates of title after the sales to first dealer, for the vehicles after first dealer failed to pay second dealer, even though second dealer had voluntarily released certificates of title to some retail buyers and others had obtained duplicate certificates of title from Department of Motor Vehicles (DMV). West's Ann.Cal.Com.Code §§ 2210(5), 9102(a)(11, 72); West's Ann.Cal.Vehicle Code §§ 6300, 6301, 6303.

****55** Law Offices of Jeffrey B. McMillen and Jeffrey B. McMillen for Plaintiff and Appellant. Prenovost, Normandin, Bergh & Dawe, Thomas J. Prenovost, Jr., Paula M. Harrelson, Santa Ana, Foell & Elder and William N. Elder, Jr., Anaheim, for Defendant and Appellant.

OPINION

SILLS, P.J.

Quartz of Southern California, Inc. (Quartz) sold certain vehicles to a used car dealer, who sold the vehicles to consumers under conditional sale contracts. The dealer sold the contracts to Mullen Bros., Inc. (Mullen), a finance company, which paid the dealer in full. The dealer went out of business and failed to pay Quartz for the vehicles, so Quartz retained the title certificates. In these cross-actions between Quartz and Mullen, the ***904** trial court issued a declaration that Quartz is the lawful owner of the title certificates but refused to order Mullen to pay Quartz for the certificates. Both Quartz and Mullen appeal.

We affirm that portion of the judgment declaring Quartz to be the lawful owner of the title certificates. However, we reverse the portion

awarding no money to Quartz; we remand to the trial court for a calculation of the amount Mullen owes to Quartz.

FACTS

Most of the facts in this case are undisputed. Quartz, doing business as Quartz Dealer Direct, is a licensed wholesale used auto auction. It acquires vehicles from licensed dealers and sells them to other licensed dealers at an auction sale. Quartz's practice is to accept vehicles from **56 the selling dealers without a title certificate "because the title to the vehicle is mostly unavailable at the time that the selling dealer presents the vehicle for sale. That could be because of a lag in getting the payoff to the previous owner of title, but, in any event, the title is not required for the vehicle itself to go through the auction."

Quartz would generally require the buying dealer to pay for a vehicle before taking possession. With some dealers, however, Quartz had "a previous arrangement with that buying dealer to be able to leave the premise[s] with the vehicle based on a signature agreement to come back and pay for the title when it is available." In that case, the buying dealer would not be obligated to pay for the vehicle until Quartz received the title certificate from the selling dealer and contacted the buying dealer. Anthony Qualin, doing business as Mohawk Leasing (Mohawk), was a licensed used car dealer who had such an arrangement with Quartz.

Mohawk bought the 17 vehicles which are the subject of this dispute from Quartz and took possession without paying. With Quartz's knowledge, Mohawk sold each vehicle to a retail buyer as soon as possible after obtaining possession. Each buyer financed the purchase through a conditional sale contract. Mohawk then sold the contracts to Mullen, doing business as Mullen Finance Plan, which paid Mohawk the full amount of the agreed price.

Quartz paid its selling dealers for all 17 cars and received title certificates to each one. When it notified Mohawk that payment was due, it

discovered Mohawk had gone out of business, leaving a debt to Quartz of \$94,720. Quartz refused to release the title certificates to the retail buyers until Mullen paid Quartz on Mohawk's behalf. Mullen refused to pay Quartz but tried to *905 obtain duplicate title certificates for some of the retail buyers who had paid off their indebtedness. Mullen was partially successful; the Department of Motor Vehicles (DMV) issued duplicate title certificates to seven of the vehicles without procuring a release from Quartz, showing Mullen as legal owner. Subsequently, Quartz agreed to surrender the title certificate to each consumer who paid off his indebtedness while preserving its right to pursue a remedy against Mullen.

At trial, Quartz proceeded against Mullen and the DMV for declaratory relief and against Mullen for fraud on its second amended complaint. Mullen proceeded against Mohawk for negligent misrepresentation and breach of contract and against Quartz and the DMV for quiet title and declaratory relief on its first amended cross-complaint. Mohawk appeared and stipulated that it owed money to Quartz and it would indemnify Mullen if Mullen was ordered to pay anything to Quartz. Quartz stipulated it would not seek any monetary recovery from the DMV; in return, the DMV stipulated that it would "abide by the determination of this Court, respecting transfer of registration or title to the vehicle in question herein so long as all parties having an interest are properly given notice of this action. In addition, the DMV must receive the statutorily required documents and fees due in order to process said transfer...."

Qualin testified that when Mohawk sold a vehicle to a retail buyer on credit, he wanted to sell the conditional sale contract to a lender as soon as possible. Some lenders insisted Mohawk have the title to a vehicle before they would pay for the contract. These lenders typically paid Mohawk the face value of the amount owing on the contract. Mullen, on the other hand, did not require title but discounted the value of the contract. "A discount is when a conditional sales contract has an **57 unpaid ... balance, meaning the balance that the

customer owes plus interest, and the lender, instead of advancing that unpaid balance and making their profit off the interest, advances a lower figure, thereby increasing their profit.” Consequently, Mullen was willing to buy contracts with “less creditworthy” customers. So Mohawk would go to Mullen if it did not have the title certificate and needed payment quickly or when it had a customer that the other lenders would not accept.

The court found, “MOHAWK created the problem by not paying Quartz when titles arrived. Quartz started the situation leading to this dilemma by giving possession of the motor vehicles to MOHAWK and not stopping MOHAWK from selling the cars to third persons (consumers) before the title arrived. Mullen should have waited for title to arrive before funding the loan but didn’t, and thus acquired only what MOHAWK was able to provide as to title. In this case nothing. Mullen is now in the position of being an *906 unsecured creditor.... There was not fraud or illegal intent or actions on the part of Mullen as to Quartz.”

The trial court framed the remaining issue as follows: “[W]hether or not, under the facts presented, MULLEN achieved the status of Buyer in the Ordinary Course and thus defeated the security interest of QUARTZ within the meaning of section 9320 of the Commercial Code.” It found that Mullen did not act in “a ‘commercially reasonable’ manner when it funded the loans without at least verifying the right to title by MOHAWK before paying MOHAWK for the vehicles.... The record demonstrates that even the Department of Motor Vehicles cannot keep up with the volume and pace of cars moving through the industry. The amount of registration information required to be kept by the agency is staggering. When this is coupled with the number of cars being bought and sold every day and when one considers the number of times a particular car changes hands within days, it would be impossible for everyone in the chain to keep up.... [¶] It would have been simple to require MOHAWK, before getting paid, to provide information as to where MOHAWK got the motor vehicle and verify, as far as they needed to, that

MOHAWK was entitled to title when it caught up. [¶] ... MULLEN is NOT entitled to Buyer in the Ordinary Course Status.”

The court issued a declaration that as between Quartz and Mullen, Quartz is the lawful holder of title to the disputed vehicles, but Quartz was awarded nothing further on its second amended complaint. The court awarded Mullen nothing against Quartz on its first amended cross-complaint, but ordered Mohawk to indemnify Mullen for “for any money due to [Quartz].” The judgment specifically recited that it “does not act as a declaration of the rights of the individual consumers involving their right to possession of, the registration to, the title to or any other right or interest the individual consumer might have involving a Motor Vehicle that they purchased from Mohawk and financed with Mullen that was the subject of this litigation.”

Quartz appeals from the portion of the judgment stating that it take nothing further from Mullen on the complaint; it also seeks a declaration that the DMV should not have registered Mullen as the legal owner of any of the disputed vehicles. Mullen appeals from the portion of the judgment declaring Quartz the lawful holder of title to the vehicles.

DISCUSSION

Mullen's Appeal

[1] Mullen contends the trial court erred by finding that Quartz retained title **58 to the vehicles, arguing it failed to properly apply the provisions of the *907 California Uniform Commercial Code.FN1The question of title to the disputed vehicles rests on “statutory construction and the application of that construction to a set of undisputed facts.” (*Brasher's Cascade Auto Auction v. Valley Auto Sales and Leasing* (2004) 119 Cal.App.4th 1038, 1048, 15 Cal.Rptr.3d 70(*Brasher's*).) Accordingly, it is a question of law which we review independently from the trial court.

FN1. All statutory references are to the California Uniform Commercial Code

unless otherwise specified.

[2] Mullen points out that vehicles qualify as “goods” (§ 2105, subd. (1)), and argues that the series of transactions here are governed by Division 2 of the Commercial Code-“Sales” (§§ 2101, 2102). Mullen reasons title to the vehicles passed under section 2401 when they were physically delivered to Mohawk, notwithstanding the lack of title certificates.^{FN2} It then contends Mohawk had the power to transfer good title to the retail buyers under section 2403, notwithstanding his failure to pay Quartz, because Quartz entrusted possession of the vehicles to Mohawk for purposes of sale.^{FN3}

FN2. Section 2401, subdivision (2) provides: “Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place....”

FN3. Section 2403, subdivisions (2) and (3) provide: “(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business. [¶] (3) ‘Entrusting’ includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like; regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.”

Mullen is wrong. Vehicles, although goods, are excluded from the scope of Division 2 of the California Uniform Commercial Code because their sales are regulated by the Vehicle Code. Section

2102 provides that Division 2 “does not ... impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.” The California Code Comment explains, “This section would also exclude certain special statutes pertaining to sales to unique groups of buyers; for example, the provisions of the Vehicle Code relating to sale of and recording of sale of motor vehicles.” (Cal.Code com., 23A pt.1 West’s Ann. Cal. U. Com.Code (2002 ed.) foll. § 2102at p. 142.) The transfer of title to a vehicle registered in California is accomplished under Vehicle Code section 5600: “No transfer of the title or any interest in or to a vehicle registered under this code shall pass, and any attempted transfer shall not be effective, until the parties thereto have fulfilled either of the following requirements: [¶] (1) The transferor has made proper endorsement and delivery of the certificate of ownership to the transferee ...*908 and the transferee has delivered to the department ... the certificate”; or “(2) The transferor has delivered to the department ... the appropriate documents for the registration or transfer of registration of the vehicle....” (Veh.Code, § 5600, subd. (a).)

Mullen persists, contending that any rights Quartz had in the vehicles were cut off when Mohawk sold the vehicles to innocent consumers. Mullen points out the **59 parties stipulated that the retail buyers are entitled to the title certificates without payment to Quartz when they pay off their conditional sale contracts. Thus, Mullen argues, the buyers had the power to grant security interests in the vehicles through the conditional sale contracts, which Mohawk assigned to Mullen. Mullen contends its interest in the conditional sale contracts is governed by Division Nine of the Commercial Code-“Secured Transactions”-because it purchased chattel paper (§ 9102, subd. (a)(11)) and by definition became a secured party (§ 9102, subd. (a)(72)).^{FN4}

FN4. Section 9102, subdivision (a)(11) defines “ ‘Chattel paper’ ” as “a record or records that evidence both a monetary obligation and a security interest in

specific goods....”Section 9102, subdivision (a)(72)(D) defines a “ ‘Secured party’ ” as “[a] person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.”

[3] Again, Mullen is wrong. Vehicle Code section 6300 provides the exclusive method for perfecting a security interest in a vehicle not constituting inventory: “[N]o security interest in any vehicle registered under this code, irrespective of whether the registration was effected prior or subsequent to the creation of the security interest, is perfected until the secured party or his or her successor or assignee has deposited ... with the department ... a properly endorsed certificate of ownership to the vehicle subject to the security interest showing the secured party as legal owner....” The provisions of the Uniform Commercial Code do not come into play to determine the rights of competing parties until the security interest is perfected under the Vehicle Code. (Veh.Code, §§ 6301, 6303.)

The trial court relied on *Brasher's, supra*, 119 Cal.App.4th 1038, 15 Cal.Rptr.3d 70 when it analyzed whether Mullen's unsecured status would take precedence over what it characterized as Quartz's security interest. Brasher's, like Quartz, sold cars on consignment, and did not pay a consignor until after the vehicle was sold and the consignor delivered title documents to Brasher's. Brasher's sold 32 vehicles to Pacific, a used car wholesaler. Unlike Quartz, however, Brasher's extended financing to Pacific and perfected a security interest in the vehicles by filing a UCC-1 “cover[ing] collateral that included inventories, whether ‘now owned or hereafter acquired.’ ” (*Id.* at p. 1044, 15 Cal.Rptr.3d 70.) Brasher's also obtained and held the certificates of title for the vehicles.

***909** Pacific sold the vehicles to Valley, a used car dealership, but failed to pay Brasher's. Subsequently, Brasher's filed a complaint for declaratory relief regarding its rights in the vehicles as against Valley. The trial court found that Valley was a buyer in the ordinary course of business and thus took title to the vehicles free of Brasher's

security interest under former California Uniform Commercial Code section 9307 (now section 9320). (*Brasher's, supra*, 119 Cal.App.4th at pp. 1046-1047, 15 Cal.Rptr.3d 70.) The appellate court found “for purposes of former section 9307, a merchant buyer must observe reasonable commercial standards to attain the protection of [buyer in the ordinary course] status.” (*Id.* at p. 1058, 15 Cal.Rptr.3d 70.) The trial court had not addressed the question of whether Valley's conduct was commercially reasonable. Finding the issue was a question of fact, the appellate court remanded the case to the trial court for a factual determination. “The specific conduct at issue concerns Valley's decision not to obtain a certificate of title at or near the time of purchase of each vehicle.” (*Id.* at p. 1069, 15 Cal.Rptr.3d 70.)

****60** The facts in *Brasher's*, however, differ significantly from those in this case. Quartz did not perfect a security interest in the vehicles, and Mullen purchased conditional sale contracts, not the vehicles themselves. This case presents a strikingly similar situation to that in *Morris Plan Co. v. Moody* (1968) 266 Cal.App.2d 28, 72 Cal.Rptr. 123 (*Morris Plan*), which supports the trial court's judgment that Quartz is the legal title holder of the vehicles, but under a different rationale than *Brasher's*. In *Morris Plan*, two vehicle owners sold their vehicles to Moody, a used car dealer, “in exchange for Moody's draft on his bank to be presented to the bank with the vehicles' title certificates.” (*Id.* at p. 29, 72 Cal.Rptr. 123.) Moody sold the vehicles to three individuals under conditional sale contracts. *Morris Plan*, a finance company, purchased the three conditional sale contracts from Moody. When the original owners presented Moody's drafts to his bank, the drafts were dishonored. The original owners refused to release the title certificates.

Morris Plan sued the original owners and Moody to quiet title to the three vehicles. *Morris Plan* argued that under the Commercial Code, a transferor of goods has the power to transfer good title to a good faith purchaser for value even if the transferor acquired the goods in exchange for a dishonored

check. (§ 2403.) But the court explained that the provisions of the Vehicle Code govern the transfer of title to vehicles, not section 2403. (*Morris Plan, supra*, 266 Cal.App.2d at pp. 29-30, 72 Cal.Rptr. 123.) Furthermore, the Vehicle Code also governs the perfection of a security interest in a vehicle. "Sections 6300-6301 of the Vehicle Code provide a security interest in a vehicle is not perfected until the secured party has deposited with the Department of Motor Vehicles, a properly endorsed certificate of ownership showing the secured party as legal owner. When the security interest has been so perfected the rights of all persons shall be subject to the provisions of the Uniform Commercial Code." (*Id.* at p. 30, 72 Cal.Rptr. 123.) The court found that the original owners retained title to the vehicles because title never passed from them to *910 Moody, and Morris Plan purchased security interests which had not been perfected in the manner required by the Vehicle Code.

[4] Here, Mullen purchased the conditional sale contracts, which gave it the right to collect moneys due under their terms. (*Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal.App.2d 173, 187, 38 Cal.Rptr. 525.) But as in *Morris Plan*, Mullen acquired no security interests from Mohawk, because Mohawk did not perfect them under the Vehicle Code. Thus Quartz holds title to the vehicles unimpaired by any security interests.

Quartz's Appeal

Quartz contends the trial court erred in failing to give it a remedy against Mullen. It argues the policies of the Commercial Code would be best served by requiring Mullen to pay it for the titles to the vehicles. We agree.

"[T]he ultimate goal of the California Uniform Commercial Code is to set forth rules of law that promote the optimal allocation of society's resources, i.e., promote economic efficiency. In the context of the used car industry, the goal can be restated as making vehicles available to consumers as efficiently as possible." (*Brasher's, supra*, 119

Cal.App.4th at p. 1053, 15 Cal.Rptr.3d 70.) The goal of economic efficiency does not necessarily equate with the goal of fairness in tort law. "[T]ort law 'is designed primarily to apportion loss' and ... the guiding principle in such an apportionment is fairness. 'In tort law courts **61 have equated fairness with fault. The rule of comparative negligence is a perfect expression of this principle. [] The UCC, however, was designed to facilitate commerce primarily by guiding and making predictable the consequences of behavior,' and its loss apportionment function is secondary to this primary function. [Citations.]' [] Although, for example, tort law ordinarily would distribute loss caused by a forged signature or endorsement on a negotiable instrument on the basis of fault, '[t]he UCC, however, for the most part does not look at actual fault. [Fn. omitted.] Instead, it places responsibility on the party which ordinarily would be in the best position to prevent the loss. [Fn. omitted; citations.]' ... [Citation.]" (*Los Angeles Nat. Bank v. Bank of Canton* (1991) 229 Cal.App.3d 1267, 1278, 280 Cal.Rptr. 831.)

[5] The findings of the trial court support the conclusion that Mullen is in the better position to prevent the loss caused by Mohawk while minimizing the disruption of the efficient flow of used vehicles from dealers to consumers. The trial court found that Mullen did not act in a commercially reasonable manner when it failed to verify Mohawk's title before purchasing the sale *911 contracts because a finance company could easily verify that a dealer had title, or it could ascertain who held the title and how much was owed to obtain it.

Another reason Mullen should bear the loss of Mohawk's default is because Mullen is Mohawk's assignee, thereby stepping into Mohawk's shoes. The parties stipulated that Mohawk had the duty to register the vehicles with the DMV reflecting the consumers as registered owners and Mullen as lienholder, which required the acquisition of the certificates of title. Qualin testified it was his responsibility as a dealer to get title into the consumer's name. "[A]nd it's the right thing to do. I

mean you sell the car, you have to provide a title.” The Automobile Sales Finance Act (Civ.Code, §§ 2981-2984.5) provides that “[a]n assignee of the seller’s right is subject to all equities and defenses of the buyer against the seller, notwithstanding an agreement to the contrary, but the assignee’s liability may not exceed the amount of the debt owing to the assignee at the time of the assignment.” (Civ.Code, § 2983.5, subd. (a).)

Both the Automobile Sales Finance Act and the Commercial Code are concerned with protecting the buyer who makes payments to the assignee of the conditional sale contract. Section 2210, subdivision (5), provides that “[a]n assignment of ‘the contract’ or of ‘all my rights under the contract’ or an assignment in similar general terms is an assignment of rights and, unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by him or her to perform those duties....” The Uniform Commercial Code Comment explains, “Subsection (5) recognizes that the non-assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.” (U. Com.Code com., 23A pt.1 West’s Ann. Cal. U. Com.Code (2002 ed.) foll. § 2210 at p. 236.)

Mullen argues only the buyers can enforce its performance of Mohawk’s duties under the conditional sale contracts. But the buyers are not parties to this action. The trial court ruled that as between Quartz and Mullen, Quartz is the legal owner of the title certificates. The court erred in failing to order Mullen to purchase**62 the titles from Quartz for transfer to the consumer buyers. The facts that Quartz has voluntarily released titles to some of the buyers and others have obtained duplicate titles from the DMV do not affect Mullen’s duty.

DISPOSITION

The portion of the judgment declaring Quartz to be the legal holder of the titles is affirmed, as is the judgment on the cross-complaint. The portion of the judgment that Quartz take nothing further under its second amended complaint is reversed, and the matter is remanded to the trial court to determine the amount of money due from Mullen to Quartz. Quartz is ordered to take the necessary steps through the DMV to ensure that title to each vehicle accurately reflects the consumer buyer’s interest. In the interest of justice, each party shall bear its own costs on appeal.

WE CONCUR: RYLAARSDAM, J., and FYBEL, J.

Cal.App. 4 Dist., 2007.

Quartz of Southern California, Inc. v. Mullen Bros., Inc.

151 Cal.App.4th 901, 61 Cal.Rptr.3d 54, 07 Cal. Daily Op. Serv. 6300, 2007 Daily Journal D.A.R. 7910

END OF DOCUMENT

How to Produce a Webinar

Simply provide the following to your Section Coordinator:

- ❑ The date/time/length of your program
- ❑ The title of the program
- ❑ A 100 word “marketing blurb” describing the topic
- ❑ The speaker names + email addresses

At that point, your job is DONE!

Bar staff will then

- ❑ Post your program in the Online CLE Catalog on the Bar website
- ❑ Post a notice of your program on your Section’s home page.
- ❑ Prepare and send out an e-blast to your entire membership with a direct link to the place where they can register
- ❑ Contact the speakers to get the PPT presentation and set up a rehearsal for 2-3 days prior to the program date (20 minutes)
- ❑ Provide the production company with the written materials to be provided to all registrants

Westlaw Attached Printing Summary Report for FRIEDMAN,ARTHUR 6042004

Date/Time of Request:	Friday, January 04, 2008 16:35:00 Central
Client Identifier:	09X8-126533
Database:	CA-ORCS
Citation Text:	2 Cal.App.3d 98
Lines:	386
Documents:	1
Images:	0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.

Westlaw

2 Cal.App.3d 98

Page 1

2 Cal.App.3d 98, 82 Cal.Rptr. 434
(Cite as: 2 Cal.App.3d 98)

C

Hawkins v. York
Cal.App.2.Dist.

JAMES HAWKINS, Plaintiff and Appellant,
v.
RUBY M. YORK, Defendant and Respondent
Civ. No. 32820.

Court of Appeal, Second District, Division 5,
California.
November 25, 1969.

SUMMARY

In a quiet title action, the trial court entered judgment for the defendant. Some 28 years prior to the filing of the action, plaintiff had conveyed real estate to defendant and her husband (since deceased) as joint tenants by an agreement providing for payment of \$200 per month to plaintiff for the rest of his life. The property was not to be sold or encumbered during plaintiff's lifetime and defendant was entitled to terminate the agreement at any time by reconveyance of the property to plaintiff and the furnishing of a title certificate showing freedom from encumbrances. For purposes of termination, leases were not to be considered as encumbrances. At trial, plaintiff contended, inter alia, that the agreement was void for lack of consideration and that defendant had breached the encumbrance restriction by leasing portions of the property without plaintiff's consent. (Superior Court of Los Angeles County, Earl C. Broady, Judge.)

The Court of Appeal affirmed the judgment of the trial court, holding that, under a proper interpretation, the consideration was sufficient to support the contract. The court took the view that the contract was ambiguous and that extrinsic evidence was properly admitted. It further held that leases were not encumbrances within the contemplation of the agreement, particularly in view

of plaintiff's knowledge of the leases for most of the period that the agreement was in effect without complaint on his part. (Opinion by Stephens, Acting P. J., with Aiso and Reppy, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Contracts § 87--Consideration--Sufficiency.
In a quiet title action, the trial court properly found that an agreement transferring certain real property from plaintiff to defendant and her husband in return for specified monthly payments to plaintiff for the rest of his life was not void for lack of consideration, where an ambiguously worded provision of the agreement allowing termination by the defendant upon reconveyance of the property to plaintiff, interpreted in consonance with the spirit of the agreement and the circumstances of the parties, would allow defendant to escape paying only those monthly instalments accruing after reconveyance, and where the termination clause required not only reconveyance but also delivery of a title certificate showing freedom from encumbrances.
[See **Cal.Jur.2d**, Contracts, § 27 et seq.; **Am.Jur.2d**, Contracts, § 85 et seq.]

(2) Contracts § 137--Interpretation--Ambiguity.
In a quiet title action involving the interpretation of a written agreement, the trial court correctly admitted extrinsic evidence of the circumstances under which the instrument was executed where a pertinent portion of the agreement was ambiguous.

(3) Contracts § 161(3)--Interpretation--Functions of Appellate Courts-- Ambiguities.
On appeal in a quiet title action involving interpretation of an ambiguity in a written agreement, the appellate court was required to make an independent interpretation of the language, in light of the entire instrument and the extrinsic

© 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

2 Cal.App.3d 98, 82 Cal.Rptr. 434
(Cite as: 2 Cal.App.3d 98)

evidence adduced in the trial court, where the extrinsic evidence was not conflicting, and where the trial court made no finding as to the meaning of the language in question.

(4a, 4b) Covenants, Conditions, and Restrictions § 91--Restrictions-- Breach.

In a quiet title action involving a contract of conveyance of real property from plaintiff to defendant, the trial court properly found that defendant did not breach the contract by leasing portions of the property to others, where the contract language proscribed selling or encumbering during plaintiff's lifetime, where a termination provision of the contract expressly stated that for purposes of that paragraph leases should not be deemed to be encumbrances, and where there was ample evidence to support the trial court's finding that during most of the 28 years after the contract was executed plaintiff was aware that the property had been leased by defendant to various third parties for the operation of business enterprises, and did not complain about the leases during that period.

[See **Cal.Jur.2d**, Contracts, § 129; **Am.Jur.2d**, Contracts, §§ 247, 248.]

(5) Contracts § 141--Interpretation--Meaning of Words.

While a lease may ordinarily be considered to be an encumbrance, the parties to a contract have a right to exclude what they wish from the ambit of any term which they use in an agreement.

(6) Contracts § 153--Interpretation--Construction in Favor of One Party.

While ambiguities in a provision of a contract should be construed most strongly against the party whose lawyer drafted the agreement, no term of a contract is uncertain or ambiguous if its meaning can be ascertained by fair inference from the other terms of the agreement.

COUNSEL

Kelley & Clark and Stanley D. Clark for Plaintiff and Appellant.

Burton, Gauldin, Thomson & Nelson and R. Jackson Gauldin for Defendant and Respondent.

STEPHENS, Acting P. J.

Plaintiff appeals from a judgment for defendant Ruby York in an action to quiet title to certain real property.

In August 1937 plaintiff owned a parcel of real property located in Whittier, California. On August 2, 1937, he entered into an agreement with defendant and her husband Victor York. Under the agreement plaintiff transferred the property to the Yorks as joint tenants. In exchange, the Yorks promised to pay plaintiff \$200 per month until he died and agreed not to sell or encumber the property during plaintiff's lifetime. The Yorks were given the right to reconvey the realty to plaintiff at any time and thereby terminate all their obligations under the agreement.

Before executing the agreement, plaintiff leased part of the property to The Texas Company for use as a service station. This lease was in effect when plaintiff and the Yorks entered into their agreement. Beginning in *101 1939 the Yorks leased various portions of the property to third parties. One of these leases was entered into with The Texas Company and was joined in by plaintiff. All told, the Yorks entered into no less than six leases without plaintiff's express consent. At least two of this number were in existence at the time of trial.

Victor York died in 1963. The parties stipulated that the Yorks, and after Victor's death defendant, caused \$200 to be paid to plaintiff each month from September 1, 1937, to the date of trial. These payments totaled in excess of \$70,000. At no time before trial did the Yorks exercise their termination rights under the agreement.

On February 8, 1966, nearly 29 years after he had signed the agreement, plaintiff notified defendant that he considered her in default of her obligations under the agreement since, he asserted, she had permitted the property to become encumbered. Plaintiff declared in the notice that if defendant did not remove the encumbrances within 10 days he would enforce his "rights of reversion." Nine days later plaintiff advised defendant that he considered the agreement void for lack of mutuality since defendant, he alleged, could cancel it at any time "without liability."

(1a) When defendant failed to comply with the demand to remove encumbrances, plaintiff brought this quiet title action. As in his notices to defendant, at trial plaintiff complained: (1) that the agreement was void for lack of mutuality and consideration, and (2) that the defendant had breached the agreement by encumbering the property. The second claim he based on the fact that the Yorks had leased the parcel to various third parties, and that two of these leases were still in effect. Having lost below, plaintiff advances the same two contentions on appeal. We are in accord with the trial court and find that both arguments lack merit.

We set portions of the agreement forth at this point so that the context of our determination of the issues be clear:

“Grant Deed and Agreement

“This Agreement, made and entered into this 2d day of August, 1937, by and between James Hawkins, a single man, of the County of Los Angeles, State of California, hereinafter sometimes called party of the first part and Victor H. York and Ruby M. York, husband and wife, of the County of Los Angeles, State of California, hereinafter sometimes called parties of the second part. *102

“Witnesseth:

“Whereas, the party of the first part is the owner of that certain real property hereinafter described and is desirous of transferring the same to the parties of the second part upon the terms and conditions hereinafter set forth.

“Now, Therefore; it is understood and agreed that subject to the terms and conditions hereof, the said parties of the second part hereby agree to pay to the party of the first part, so long as the party of the first part shall live, the sum of Two Hundred (\$200.00) Dollars per month, payable monthly in advance, commencing September 1, 1937.

“For and in consideration of the covenants and agreements herein contained, the said James

Hawkins hereby grants to Victor H. York and Ruby M. York, husband and wife as joint tenants, all that real property in the City of Whittier, County of Los Angeles, State of California, described as:

“

.....

“Subject ... to conditions, reservations, restrictions, and rights of way, if any, of record. Subject also to lease executed by James Hawkins a single man to The Texas Company, a corporation, dated January 10, 1937.

“It is understood and agreed that the parties of the second part shall be, and they are hereby restrained from selling and/or encumbering said premises for and during the life of the party of the first part; provided that the existing Federal income tax lien now of record against the parties of the second part, or either of them, shall not be deemed to be an encumbrance within the meaning of this paragraph.

“It is understood and agreed that the parties of the second part shall have the right at any time hereafter during the life of the party of the first part to convey said premises to the party of the first part by good and sufficient grant deed thereof accompanied by a title certificate of a title company operating in Los Angeles County, California, showing said premises at the time of said reconveyance to be free and clear of all liens and encumbrances other than those existing at the date hereof; provided that leases of said premises shall not be deemed to be encumbrances within the meaning of this paragraph. Upon the execution of said conveyance by parties of the second part to the party of the first part, the parties of the second part shall thereupon be relieved of all further obligations hereunder accruing or to accrue after the date of said conveyance.

“It is understood and agreed that upon a breach of any of the foregoing *103 covenants and agreements hereinabove set forth to be by the parties of the second part performed, and the same not having been by the parties of the second part

cured within (10) days after written notice thereof to them by the party of the first part, said premises shall ipso facto revert to the said grantor, his heirs and assigns and that said grantor shall thereupon have the right of immediate re-entry upon said premises in the event of such breach and failure to cure the same as herein provided.

"It is further understood and agreed that proof of performance of the covenants and agreements herein provided to be performed by the parties of the second part may be made by recording a certified copy of the death certificate of the party of the first part, together with a cancelled bank check marked paid, covering payment due by the parties of the second part to the party of the first part on the 1st day of the month during which the death of the party of the first part occurred.

"Witness our hands this 2d day of August, 1937.

"James Hawkins

Party of the First Part

Victor H. York

Ruby M. York

Parties of the Second Part"

Plaintiff claims that the Yorks' promise to pay him \$200 per month was illusory. He predicates his argument on what we think is an erroneous interpretation of the termination provision of the agreement. The portion of the provision upon which he relies reads as follows: "Upon the execution of said conveyance by parties of the second part [the Yorks] to the party of the first part [plaintiff], the parties of the second part shall thereupon be relieved of all further obligations hereunder accruing or to accrue after the date of said conveyance." Plaintiff contends that this language allows the Yorks, by reconveying the property to plaintiff, to avoid paying plaintiff the \$200 monthly installments accruing both *before* and after the reconveyance, not merely those accruing after reconveyance.

(2) The quoted portion of the agreement is ambiguous. The problem is whether the phrase "after the date of said conveyance" was meant to modify the expression "accruing or to accrue," or just the words "to accrue." The trial court correctly admitted extrinsic evidence of the circumstances under which the instrument was executed. (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 [69 Cal.Rptr. 561, 442 P.2d 641]; *Estate of Russell* (1968) 69 Cal.2d 200, 210-212 [70 Cal.Rptr. 561, 444 P.2d 353]; *United States Leasing Corp. v. du Pont* (1968) 69 Cal.2d 275, 284 [70 Cal.Rptr. 393, 444 P.2d 65];*104 *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522 [67 Cal.Rptr. 761, 439 P.2d 889]; *Davidson v. Welch* (1969) 270 Cal.App.2d 220, 231-232 [75 Cal.Rptr. 676].) (3) The extrinsic evidence introduced was not conflicting, and the court made no finding as to the meaning of the language in question. Therefore, this court must make an independent interpretation of the language, in light of the entire instrument and the extrinsic evidence adduced below. (*Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 866 [44 Cal.Rptr. 767, 402 P.2d 839]; cf. *Pierpont Inn, Inc. v. State of California* (1969) 70 Cal.2d 282, 294 [74 Cal.Rptr. 521, 449 P.2d 737]; *Miller v. Citizens Sav. & Loan Assn.* (1967) 248 Cal.App.2d 655, 660-661 [56 Cal.Rptr. 844].)

(1b) We have concluded that it is more consonant with the spirit of the agreement and the circumstances of the parties to interpret the language as allowing the Yorks, by reconveying to plaintiff pursuant to the termination clause, to escape from paying him only those installments which would accrue *after* such reconveyance. The evidence demonstrates that plaintiff's major objective in signing the agreement was to obtain "security for life." Plaintiff understood that under the agreement he had a right to receive \$200 per month for the rest of his life, or until the Yorks reconveyed the property. There is evidence that he looked upon the agreement as sort of a "lease" which would give him the security he sought. ^{FN1}Since plaintiff thought in such terms, it seems unreasonable to conclude that he would agree to an arrangement allowing the Yorks to hold the property without paying the \$200 monthly "rent" which would accrue

2 Cal.App.3d 98, 82 Cal.Rptr. 434
(Cite as: 2 Cal.App.3d 98)

during their occupancy particularly in light of the words "all further obligations" thus speaking to the future. Our interpretation is buttressed by the language of the paragraph following the termination provision, which language provides that if the Yorks default on their promises the property reverts to plaintiff. The agreement throughout appears to envision that plaintiff should receive \$200 per month or get his property back.

FN1 Defendant testified that before the signing of the agreement her husband told plaintiff that he would get \$200 per month for the remainder of his life. She also testified that, when she inquired of her husband why they were not just buying the property outright, plaintiff interjected: "That is just the way I want it. The *lease* is just the way I want it. I want security." (Italics added.)

As we have construed the agreement, there was sufficient consideration flowing from the Yorks to plaintiff to support a contract. By the instrument's terms defendant and her husband could choose between two alternatives: to keep the property and pay plaintiff, so long as he lived, \$200 per month; or to reconvey the property to plaintiff having paid plaintiff at the rate of \$200 per month for the term of their occupancy. *105

Certainly the obligation to make the monthly payments was a benefit to plaintiff and a detriment to the Yorks.

The Yorks' right to terminate the agreement was by no means unqualified. If they elected to cease performance, they were required, as a condition precedent to termination, (1) to reconvey the property to plaintiff by executing and delivering a grant deed, and (2) to secure and deliver to plaintiff a title certificate showing the property to be free and clear of all liens and encumbrances other than those existing at the date of the agreement. The delivery of a deed and a title certificate would serve to notify plaintiff of termination. Although the cases are more clear where a specified period of notice is required by the agreement (*Brawley v. Crosby etc.*

Foundation, Inc. (1946) 73 Cal.App.2d 103, 113-118 [166 P.2d 392]), this court recently held that the requirement to notify of termination is a significant qualification of the option to cease performance, even without a time lapse between notification and termination. (*Millgee Inv. Co. v. Friedrich* (1967) 254 Cal.App.2d 802, 805-806 [62 Cal.Rptr. 730]; see also 1A Corbin, Contracts, § 163, pp. 76-83.) Moreover, by delivering plaintiff a grant deed, the Yorks would be personally covenanting to him that they had never conveyed the property to a person other than plaintiff, and that the property at the time of reconveyance was free from encumbrances imposed by them or by any person claiming under them. (Civ. Code, § 1113; 2 Witkin, Summary of Cal. Law (1960) Real Property, § 34, pp. 890-891.) We think the Yorks' right to terminate the agreement, as thus conditioned, does not render illusory their promise to pay plaintiff \$200 a month for the rest of his life.

Nor can the Yorks, pursuant to the paragraph following the termination clause, escape their obligations under the termination clause merely by failing to pay plaintiff \$200 per month or by encumbering the property. First, the Yorks could not, unilaterally, cause the reversion of title to plaintiff. Title reverts only after plaintiff has elected to invoke the default provision by giving written notice of the default. Moreover The only way the default provision would allow the Yorks to avoid their obligations under the termination clause is if the former is interpreted to allow the Yorks to *terminate* the agreement by defaulting. Such a construction would render the termination clause superfluous. And we are bound to give effect to every provision of the agreement, if reasonably practicable. (Civ. Code, § 1641; *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, 760 [128 P.2d 665]; *Alperson v. Mirisch Co.* (1967) 250 Cal.App.2d 84, 90 [58 Cal.Rptr. 178].)

(4a) Plaintiff's second contention - that the Yorks breached the contract by encumbering the property, is also based upon a misconstruction of *106 the agreement. The language involved here reads as follows: "It is understood and agreed that the parties of the second part [the Yorks] shall be, and they are

2 Cal.App.3d 98, 82 Cal.Rptr. 434
(Cite as: 2 Cal.App.3d 98)

hereby restrained from selling and/or encumbering said premises for and during the life of the party of the first part [plaintiff]; provided that the existing Federal income tax lien now of record against the parties of the second part, or either of them, shall not be deemed to be an encumbrance within the meaning of this paragraph." Plaintiff argues that the term "encumbrance" as used in the quoted paragraph includes all leases of the property granted without his consent. We disagree.

(5) We recognize that a lease may ordinarily be considered to be an encumbrance. (See e.g., *Evans v. Faught* (1965) 231 Cal.App.2d 698, 710-711 [42 Cal.Rptr. 133]; *Mann v. Montgomery* (1907) 6 Cal.App. 646, 648 [92 P. 875].) But parties to a contract have a right to exclude what they wish from the ambit of any term which they use in their agreement.

(6) Plaintiff correctly points out that any ambiguities in the provision in question should be construed most strongly against defendant, since it was the Yorks' lawyer who drafted the agreement. (Civ. Code, § 1654; *Laux v. Freed* (1960) 53 Cal.2d 512, 524 [2 Cal.Rptr. 265, 348 P.2d 873]; *Taylor v. J. B. Hill Co.* (1948) 31 Cal.2d 373, 374 [189 P.2d 258]; *Estate of Rule* (1944) 25 Cal.2d 1, 13 [152 P.2d 1003, 155 A.L.R. 1319].) But no term of a contract is uncertain or ambiguous if its meaning can be ascertained by fair inference from the other terms of the agreement. (*Pico Citizens Bank v. Tafco, Inc.* (1958) 165 Cal.App.2d 739, 749 [332 P.2d 739]; *Kanner v. National Phoenix Industries, Inc.* (1962) 203 Cal.App.2d 757, 760-761 [21 Cal.Rptr. 857].) (4b) And, in the case at bench, the meaning of the term "encumbrance" can be determined from the context in which it appears. The termination provision expressly states that for purposes of that paragraph "... leases of said premises shall not be deemed to be encumbrances. ..." Since plaintiff thereby permitted the vendees to reconvey the property subject to leases, it seems illogical to suggest that the preceding paragraph forbids the Yorks from leasing the property during their occupancy.^{FN2}

FN2 If the term "leases," as used in the

termination paragraph is taken to mean only leases in existence at the execution of the agreement, we could logically conclude that the word "encumbrances," as used in the provision in question, includes subsequent leases of the property. Such an interpretation, however, would render the termination provision redundant.

The most persuasive evidence against plaintiff's interpretation of the instrument is furnished by the conduct of the parties in the 28 years after the agreement was executed. The trial court found, and there is ample evidence to support the finding, that during most of this time plaintiff was *107 aware that the property had been leased to various third parties for the operation of business enterprises. Despite this knowledge, plaintiff at no time prior to 1966 complained to the Yorks of the leases. We think that plaintiff's apparent acquiescence in the Yorks' repeated leasing of the subject property demonstrates that the parties interpreted their own agreement as permitting the Yorks to lease the property as they pleased during their occupancy. (Cf. *Wilson v. Corrugated Kraft Containers, Inc.* (1953) 117 Cal.App.2d 691, 694-695 [256 P.2d 1012]; *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 752-755 [8 Cal.Rptr. 427, 356 P.2d 171].)

The judgment is affirmed.

Aiso, J., and Reppy, J., concurred.

A petition for a rehearing was denied December 9, 1969, and appellant's petition for a hearing by the Supreme Court was denied January 21, 1970.

Cal.App.2.Dist.

Hawkins v. York

2 Cal.App.3d 98, 82 Cal.Rptr. 434

END OF DOCUMENT